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The Seniority System Exemption to Title VII of the Civil Rights Acts: The Impact of a New Barrier to Title VII Litigants

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NOTES

THE SENIORITY SYSTEM EXEMPTION TO TITLE VII OF THE CIVIL RIGHTS ACTS: THE IMPACT OF A NEW BARRIER TO TITLE VII LITIGANTS*

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I. INTRODUCTION

"'Discrimination' . . . is in general a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."[1] Discrimination in employment is particularly invidious because it denies equal employment opportunities to those who are similarly situated. Congress has prohibited discrimination in employment by enacting Title VII of the 1964 Civil Rights Act,[2] which makes a practice unlawful where it differentiates "because of such individual's race, color, religion, sex, or national origin . . . ."[3] Seniority

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[1] Baker v. California Land Title Co., 349 F. Supp. 235, 238 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975).

[2] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

[3] *Id.* § 2000e-2(a) (1976). The full text of this section sets out the general principles of

systems are practices that have the potential to discriminate unlawfully where lines of progression are based on discriminatory grounds. However, Congress sought to protect bona fide seniority systems by enacting section 703(h) of the Act.[4] The relevant part of section 703(h) states:

> [I]t shall not be an unlawful employment practice for an employer[5] to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .[6]

The inclusion of this section reflects the importance of seniority systems to all who work.[7]

Seniority relates to length of employment. A seniority system is a scheme or plan which gives increased rights or benefits to employees as their length of employment increases.[8] Different methods of measuring

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Title VII:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[4] *Id.* § 2000e-2(h).

[5] "Employer" is a person engaged in an industry affecting commerce, with 15 or more employees, for 20 or more calendar weeks in the year. *Id.* § 2000e(b).

[6] *Id.* § 2000e-2(h). The complete text of this section reads:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of § 206(d) of title 29.

[7] *See generally* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962) (discusses the importance of seniority in the labor movement, and the history of seniority systems).

[8] California Brewers Ass'n v. Bryant, 444 U.S. 598, 606, *reh'g denied*, 445 U.S. 973

seniority are utilized by employers. Seniority may be measured solely by length of employment at a company, or by length of employment within a particular department or job.[9] The most important purpose of seniority systems is the maintenance of a stable work force through realistic employee expectations. These systems play a significant role in collective bargaining and union decision-making.[10] Therefore, section 703(h) was passed as an exemption to Title VII, in order to protect bona fide systems of seniority.

When Title VII was enacted, there was a clear need to protect seniority systems. But, since passage of the Act, the scope of the protection has been the subject of interpretational difficulties. The exemption embodied in section 703(h) is limited to "bona fide" seniority systems, but neither the legislative history nor the courts have defined the meaning of "bona fide."

The purpose of Title VII was "the prevention of unlawful employment discrimination and the amelioration and elimination of the effects of past discrimination."[11] To this end, the courts historically have looked at the "effects" of discrimination rather than the "intent" to discriminate, when analyzing a Title VII violation.[12] Yet recently, the Supreme Court, in *American Tobacco Co. v. Patterson*,[13] has required a showing of intent to discriminate in the operation of a seniority system in order to prove that it is outside the section 703(h) exemption to Title VII.[14]

The *American Tobacco* decision also extended section 703(h)'s protection to post-Act seniority systems.[15] Prior to this decision, the courts held that section 703(h) protected only seniority systems in effect prior to the effective date of Title VII.[16]

In order to understand fully the ramifications of this recent Supreme

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(1979); Aaron, *supra* note 7, at 1533. "Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence . . . ." Local Lodge 2040, Int'l Ass'n of Machinists v. Servel, Inc., 268 F.2d 692, 698 (7th Cir.), *cert. denied*, 361 U.S. 884 (1959).

[9] Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602 (1969) (The authors of this article were counsel for employees in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and other cases regarding § 703(h)).

[10] *Id.* at 1605. *See also* Humphrey v. Moore, 375 U.S. 335, 346 (1964) (Seniority "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job.").

[11] THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, EQUAL EMPLOYMENT OPPORTUNITY: AN OVERVIEW OF LEGAL ISSUES 11 (1976) [hereinafter cited as OVERVIEW OF LEGAL ISSUES].

[12] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[13] 456 U.S. 63 (1982).

[14] *Id.* at 70.

[15] *Id.* at 68-69.

[16] *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

Court decision and its effect on section 703(h), the legislative history and the Court's interpretation of the legislative history must be considered. This Note will trace the history of section 703(h) through Congress and the courts, and will ultimately show the negative effects that the *American Tobacco* decision will have on challenges to seniority systems. In this decision, the Court broadened the scope of 703(h) without defining the term "bona fide" system. The Court therefore has erected new barriers that now face employees challenging seniority systems under Title VII, and left employers and unions without definitive guidelines detailing their duties to bargain collectively on the issue of seniority systems.

II. Historical Overview

A. *Title VII, Generally*[17]

In the 1960's, civil rights were at the forefront of political and social concern. This concern was a culmination of a history of controversies surrounding social inequality. Minorities were equal according to the law, yet, in effect, they were accorded the rank of second-class citizens. Civil rights progress was the major plank in the political platforms of both the Democratic and Republican parties in 1960.[18] The emphasis was on equal access and equal opportunity.[19] In February, 1963, President Kennedy pronounced:

> [R]ace discrimination hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the cost of public welfare, crime, delinquency, and disorder. Above all, it is wrong.[20]

It was not until five months later, however, that President Kennedy promoted federal legislation in the area of civil rights, and particularly employment discrimination. He stressed three areas that needed progress in

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[17] The first attempt at fair employment practices legislation occurred in 1941 with the introduction of H.R. 3994. It was entitled "A Bill to Prohibit Discrimination by Any Agency Supported in Whole or in Part with Funds Appropriated by the Congress of the United States, and to Prohibit Discrimination Against Persons Employed or Seeking Employment on Government Contracts Because of Race, Color or Creed." This bill and hundreds of others died in committee or by Senate filibuster. By 1957, pressure for federal legislation in the area of employment discrimination was great. This pressure led the way toward passage of the Civil Rights Act of 1964. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 431-32 (1966).

[18] 88th Cong., 2d Sess. (1964), U.S. Code Cong. & Ad. News, 2362.

[19] *Id.*

[20] 109 Cong. Rec. 3245 (1963), *reprinted in* 1964 U.S. Code Cong. & Ad. News, 2368 (Message of President John F. Kennedy, February 28, 1963; this was his first special message to Congress on civil rights legislation).

order to alleviate the position of minority workers and the minority unemployed. Progress would be attained by "creating more jobs through greater economic growth, raising the level of skills through more education and training and eliminating racial discrimination in employment."[21] Thus the stage was set for passage of H.R. 7125, later known as the Civil Rights Act of 1964,[22] and its Title VII, which dealt specifically with employment discrimination.

The broad purpose of Title VII of the Civil Rights Act was to ensure equal employment opportunity through the use of formal and informal remedial measures. Specifically, the goal of Title VII was to "eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"[23]—in other words, to remove the "barriers" to equality.[24] As originally passed, the Act prohibited discrimination by employers,[25] employment agencies,[26] and labor organizations.[27] The 1972 amendments to Title VII expanded the prohibitions to include discrimination by state, county, and municipal governments.[28]

When Title VII was first enacted, it was thought that the Act would provide clear guidance for the courts. Although Title VII was the result of many concessions reached during Senate debates, the prevalent thought was that these debates further clarified the purpose of the law. "Seldom has similar legislation been debated with greater . . . care in the making

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[21] 109 CONG. REC. 11, 174 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2392 (President Kennedy's message to Congress, June 19, 1963). *See also* Vaas, *supra* note 17, at 432.

[22] 109 CONG. REC. 11, 252 (1963). A Judiciary subcommittee conducted hearings on 172 bills related to many civil rights issues. Finally, on June 20, 1963, H.R. 7152 was proposed by Representative Celler of New York. It was a more comprehensive bill than those previously suggested, and contained eleven titles concerning voting rights, desegregation of public education, creation of the federal Equal Employment Opportunity Commission, and more. *See generally* Vaas, *supra* note 17, at 434-35.

[23] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (discusses Title VII in the context of a discharge for alleged racially discriminatory motives). *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71-72 (1977) ("Similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972); Baker v. California Land Title Co., 349 F. Supp. 235, 238 (3d Cir. 1972), *cert. denied*, 422 U.S. 1046 (1975) ("The primary purpose of Title VII is to protect minorities from economic oppression."); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[24] *See Griggs*, 401 U.S. at 429-30.

[25] 42 U.S.C. § 2000e-2(a).

[26] *Id.* § 2000e-2(b).

[27] *Id.* § 2000e-2(c).

[28] Pub. L. No. 92-261, 86 Stat. 103 (1972).

thereof, to guide the courts in interpreting and applying the law."[29] Unfortunately, the subsequent decisional history exemplifies some of the shortcomings of Title VII. The Act does not provide a definitive list of what constitutes an unlawful employment practice. Thus, courts were left with the responsibility for defining the meaning of unlawful discrimination within the Act.[30] Further, Title VII does not fully address the fact that overt, intentional discrimination is not the only impediment to equal employment opportunities. "[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent"[31] have been shown to have a discriminatory effect and have been deemed unlawful by the Court.

B. Section 703(h)

Interpretational difficulties regarding the section 703(h) exemption have proved even more serious than the affirmative provisions of Title VII. When the initial draft of the Act passed the full House on February 10, 1964, section 703(h) and its seniority provisions were not part of the Act.[32] The first opposition to Title VII based on its effect on seniority systems is found in a House minority report.[33] The authors of the report stated that "*[t]he provisions of this Act grant the power to destroy union seniority.*"[34] They further explained that to destroy seniority is to destroy unionism, and to "millions of working men and women, union membership is the most valuable asset they own."[35] Their fear included concern that unions would lose their power to bargain collectively, and that they would have to pass over qualified white employees with more seniority in favor of less-qualified, low-seniority minorities.[36] This fear of the demise of seniority systems did not generate congressional debate until the bill reached the Senate.

H.R. 7152 was introduced in the Senate on February 17, 1964.[37] Proponents of the bill took many measures to assure its passage, including the formation of bipartisan groups to lead discussion and debate.[38] As a

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[29] Vaas, *supra* note 17, at 444.

[30] *See, e.g., Griggs*, 401 U.S. 424 (1971) (racial discrimination in testing); United States v. N.L. Indus., 479 F.2d 354 (8th Cir. 1973) (racial discrimination in seniority). *See also* Rothschild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEGAL STUD. 261, 261-62 (1982).

[31] *See Griggs*, 401 U.S. at 430 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply motivation.") (emphasis in original).

[32] 110 CONG. REC. 7213 (1964).

[33] E.E. Willis, E.L. Forrester, Wm. M. Tuck, Robert T. Ashmore, John Dawdy & Basil L. Whitener, MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT OF 1963, COMMITTEE ON JUDICIARY SUBSTITUTE FOR H.R. 7152, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS, 2431.

[34] *Id.* at 2440 (emphasis in original).

[35] *Id.* at 2439-40.

[36] *Id.* at 2440.

[37] 110 CONG. REC. 2882. *See also* Vaas, *supra* note 17, at 443.

[38] Vaas, *supra* note 17, at 444-45. This bipartisan support for H.R. 7152 is illustrated by

result of this bipartisan effort, Senators Dirksen, Mansfield, Humphrey, and Kuchel presented the Mansfield-Dirksen amendment as a substitute for the entire bill.[39] Another substitute bill was presented by the same senators, but its provisions concerning Title VII were substantially the same as in the original substitute. On June 19, 1964, during Senate cloture, the amended version of Title VII passed the full Senate.[40] It is the Mansfield-Dirksen amendment that added, *inter alia*, subsection (h) to section 703 of Title VII.

Section 703(h) was included in Title VII in response to views expressed during Senate debate that compliance with Title VII would interfere with seniority systems. On April 8, 1964, Senator Clark introduced interpretive memoranda explaining that Title VII would not destroy existing seniority systems. One memorandum stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective."[41] This memorandum has been the subject of much discussion by the courts and originally was afforded great weight in their interpretation of 703(h).[42] However, in *American Tobacco Co. v. Patterson*, the Supreme Court, for the first time, stated that no weight is to be given to the legislative history and that the "plain language" of the subsection is all that is to be considered.[43] The Court also did not give deference to a

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Senators Humphrey and Kuchel (majority and minority whips, respectively) who authored a daily newsletter entitled "Bipartisan Civil Rights Newsletter." The newsletter was given to all proponents of the bill and was entered daily in the *Congressional Record* to ensure continued, informed support.

[39] 110 CONG. REC. 11936 (Senate Amendment No. 656). According to Senator Dirksen: "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." 110 CONG. REC. 11935.

[40] Vaas, *supra* note 17, at 446. This bill was passed by a vote of 73 to 27, with every senator present and voting. 110 CONG. REC. 14511. It was signed into law by the President of the United States on July 2, 1964. 110 CONG. REC. 14783 (1964).

[41] The text of the memorandum relevant to seniority systems is as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect, the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination).

110 CONG. REC. 7212-15 (1964). *See also* Franks v. Bowman Transp. Co., 424 U.S. 747, 759 n.15 (1975); Cooper & Sobol, *supra* note 9, at 1610 n.40.

[42] *See generally* Franks v. Bowman Transp. Co., 424 U.S. 747 (1975).

[43] American Tobacco Co. v. Patterson, 456 U.S. at 68. "On its face § 703(h) makes no distinction between pre- and post-Act seniority systems . . . ." *Id.* at 69.

Justice Department statement that Senator Clark included in the *Congressional Record* that read: "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect."[44]

To clarify the meaning of Title VII further, Senator Clark entered in the *Congressional Record* questions answered by Senator Dirksen regarding seniority. One response to a question concerning labor contracts which call for a "last hired, first fired" system, was that

> [s]eniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.[45]

During debate on the Mansfield-Dirksen substitute amendment, Senator Humphrey (one of the drafters of the seniority exemption) stated that section 703(h) "merely clarifies [the] present intent and effect" of Title VII.[46] Thus, it was not meant to alter the basic meaning and purpose of Title VII. Yet cohesive legislative materials are lacking because the proponents of the bill in the Senate managed to bring it to the Senate floor without its first going through committee.[47] Therefore, there is no Senate committee report to resolve interpretational difficulties. But it would seem from the *Congressional Record* that the emphasis was on protecting

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[44] The full text relevant to seniority is as follows:

> First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no future effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by [T]itle VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under [T]itle VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of [T]itle VII. Employers and labor organization would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 CONG. REC. 7207 (1964).

[45] 110 CONG. REC. 7217 (1964).

[46] *Id.* at 12723.

[47] *See* Cooper & Sobol, *supra* note 9, at 1609; Vaas, *supra* note 17, at 443-44 and 457-58.

seniority systems which were already in effect, from the provisions of Title VII. It is less clear whether seniority systems created after passage of the Act would also be exempted from Title VII compliance.

To exempt systems created after passage of the Act would ignore the essential purpose of Title VII. An exception in an act should not "receive such a broad construction as would destroy the plain purpose which caused the act to be adopted."[48] Title VII "should therefore be given a liberal interpretation; . . . [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended."[49] This is necessary so as not to contravene the purpose of Title VII: the elimination of discrimination in employment. Title VII states generally that an employer may not "discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment" because of race.[50] Further, an employer or union cannot "limit, segregate, or classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of race.[51] A seniority system is considered a term, condition, or privilege of employment and could easily be used to discriminate against a worker by depriving him of employment opportunities. Section 703(h) should not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups that the Act protects."[52] Further, seniority systems clearly affect an employee's status. Therefore, a broad interpretation of section 703(h), which would protect post-Act seniority systems, would be in blatant contrast to the intent and purpose of Title VII.

III. JUDICIAL INTERPRETATION

A. American Tobacco Co. v. Patterson

The Supreme Court recently addressed the problems relating to section 703(h) in *American Tobacco Co. v. Patterson*.[53] The American Tobacco Company operates two plants in Richmond, Virginia.[54] Each plant is divided into two departments: the prefabrication department, which blends

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[48] Spokane & Inland Empire R.R. Co. v. United States, 241 U.S. 344, 350 (1915) (regarding § 6 of the Safety Appliance Act of 1893, which exempts cars used upon street railways, but not cars used both in regular interstate traffic and street railways).

[49] Piedmont & Northern Ry. Co. v. ICC, 286 U.S. 299, 311-12 (1931) (discussing exemptions from the Transportation Act of 1920).

[50] 42 U.S.C. § 2000e-2(a)(1) (1964).

[51] *Id.* § 2000e-2(a)(2). *See also* Cooper & Sobol, *supra* note 9, at 1611-12.

[52] California Brewers Ass'n v. Bryant, 444 U.S. 598, 608, *reh'g denied*, 445 U.S. 973 (1979).

[53] 456 U.S. 63 (1982).

[54] One plant produces cigarettes, and the other produces pipe tobacco. *Id.* at 65.

the tobacco, and the fabrication department, which finishes the final product. Prior to 1963, the company and union practiced open discrimination. The union[55] maintained segregated locals. Additionally, it segregated the black workers into the lower-paying jobs at the prefabrication units. The white workers held the higher-paying jobs available in the fabrication department. As part of the segregation scheme, a black employee wishing to transfer from the prefabrication department to the fabrication department had to forfeit any accumulated seniority.[56]

After pressure from government procurement agencies, which were required to enforce a government contractor's anti-discrimination orders, the company instituted plant-wide seniority.[57] The black union local merged with the white local, yet discrimination still continued. Promotions became based on seniority plus "certain qualifications," and black employees continued to lose accumulated seniority if they transferred between plants. Black employees were still locked out of positions in the fabrication departments because of their desire not to lose years of seniority. The Court noted that "between 1963 and 1968, . . . virtually all vacancies in the fabrication departments were filled by white employees due to the discretion vested in supervisors to determine who was qualified."[58]

In 1968, the company abandoned its qualifications system and instituted a promotion system based on nine lines of progression.[59] Each line consisted of lower-paying positions coupled with progressively higher-paying positions. In order to be eligible for an upper-level position in a certain line of progression, it was necessary for the employee to work in the lower-level position first. Four of these lines of progression consisted of white top-level positions in the fabrication department which were linked to white bottom-level positions also in the fabrication department.[60] Because black employees had historically been excluded from jobs in the fabrication department, there remained a barrier to establishing eligibility for top positions. In other words, blacks were closed out of lower-level positions in the fabrication department initially because of race, and they remained closed out. To change their situation minorities paid a heavy price; they lost their accumulated seniority. Eventually, the plaintiffs[61] filed charges because of the continuing effect of pre-Act and

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[55] Bakery, Confectionery & Tobacco Workers' Int'l Union and its affiliate, Local 182, comprise the bargaining unit for the hourly-paid workers in both the fabrication and prefabrication units of both plants.

[56] 456 U.S. at 66.

[57] *Id.* This promotion policy was in force from 1963-1968.

[58] *Id.*

[59] *Id.* Only six of the nine lines of progression were the subject of this lawsuit. In 1969, the lines-of-progression system was ratified by the union.

[60] Therefore, the lines were either all white or all black.

[61] Patterson and two other black employees filed charges with the EEOC. When concili-

post-Act discrimination practices.

The Supreme Court determined that section 703(h) extends its protection to those seniority systems established after the effective date[62] of the Act,[63] thereby extending the breadth of the Act. Further, the Court held that in order to obtain relief from a seniority system which discriminates, a challenger must show that the system was instituted with an *intent* to discriminate.[64] The scope and the ramifications of *American Tobacco* cannot be fully understood without a discussion of the prior decisional law regarding section 703(h).

B. Prior Case Law

1. The Issue of Intent

Until 1964, many of the industrial plants which had a racially mixed force maintained formally segregated job classifications based on race.[65] The better-paying, more desirable positions were reserved for whites, while blacks were barred from competing for these positions, and were relegated to lower-paying job slots. Although overt discrimination in employment was made illegal by Title VII, black workers found that the new seniority systems instituted by their employers perpetuated the effects of past discrimination. Even if no new discrimination existed after 1965, prior job structures affected present seniority and progression rules. Often, these plants operated under a system of departmental seniority.[66] After 1965, a black worker previously excluded from a "white" department would be able to enter that department, but at the bottom of the seniority scale. The effect was that a black worker with more *company* seniority would be lower on the seniority list than a white worker who had more *departmental* seniority.

The first cases to challenge the present effects of past discrimination held that even though a seniority system was facially neutral[67] and was

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ation efforts failed, the plaintiffs filed a class action, alleging racial discrimination in violation of Title VII and 53 U.S.C. § 1981. Subsequently, the EEOC filed both a race and sex discrimination charge against American Tobacco Co. and the suits were consolidated for trial. 456 U.S. at 66-67.

[62] The effective date of Title VII was July 2, 1965, one year after the date of its enactment. 42 U.S.C. § 2000e (1970).

[63] 456 U.S. at 77.

[64] *Id.* at 65.

[65] Cooper & Sobol, *supra* note 9, at 1616.

[66] *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Sears v. Atchison T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[67] A facially neutral system is one that appears to measure performance traits without any consideration of unlawful, discriminatory factors. Note, *Rebutting the* Griggs *Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181, 182 n.14.

established without discriminatory intent, it was racially discriminatory in violation of Title VII[68] if it sustained differences in status by race, and systematically preferred whites to blacks. *Quarles v. Philip Morris, Inc.*[69] proved to be a landmark decision in this area.[70] It was the first case to challenge the legality of measuring length of service by a departmental seniority system where blacks had historically been relegated to one department.[71] The departmental system was facially neutral and thus hid the discriminatory intent inherent in the seniority system. In its decision, the court conceded that there were legitimate reasons for departmental lines of progression, and recognized that "[i]t promotes efficiency, encourages junior employees to remain with the company . . . and limits the amount of retraining that would be necessary without departmental organization."[72] However, the *Quarles* court held that the past organization by segregated departments currently worked to the disadvantage of black workers.[73]

The importance of the *Quarles* decision lies in the fact that the court determined that no present discriminatory intent was required; a past intent to discriminate that had present effects was sufficient to constitute a Title VII violation. After considering the legislative history of Title VII, the court said that "Congress did not intend to freeze an entire genera-

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[68] Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); United States v. Local 189, United Papermakers & Paperworkers, 282 F. Supp. 39 (E.D. La. 1968). *Cf.* United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968). In *Porter*, Judge Allgood attempted to distinguish this case from *Quarles* and *Local 189* by showing that the seniority plan, which had a disparate impact on blacks, was sufficient because of the demonstrated low level of ambition of black workers. 296 F. Supp. at 64-65. However, Judge Allgood predicted that the case would be of little value. 296 F. Supp. at 52.

[69] 279 F. Supp. 505 (E.D. Va. 1968).

[70] Cooper & Sobol, *supra* note 9, at 1617.

[71] Minority workers were historically relegated to the lowest-paying, least-desirable departments, especially in the South. But Northern employers also used this method to racially discriminate. Black employees at Bethlehem Steel's Lackawanna, N.Y. plant were systematically pigeon-holed into the least desirable departments. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[72] 279 F. Supp. at 513.

[73]

> The present discrimination resulting from historically segregated departments is apparent from consideration of the situation of a Negro who has worked for ten years in the prefabrication department. . .[He must] sacrifice his employment seniority and take new departmental seniority based on his transfer date. Thus a Negro with ten years employment seniority transferring . . . from the prefabrication department to the fabrication department takes an entry level position with departmental seniority lower than a white employee with years less employment seniority. These restrictions upon the present opportunities for Negroes result from the racial pattern of the company's employment practice prior to Jan. 1, 1966.

Id.

tion of Negro employees[74] into discriminatory patterns that existed before the act."[75]

United States v. Local 189, United Papermakers & Paperworkers,[76] was in full agreement with *Quarles* when the court stated:

> It is not the job seniority system in and of itself, but rather the continuous discrimination practiced by the defendants within the framework of that system, which now requires that the system be abolished in this case . . . . The defendants claim that active discrimination against Negroes has now ceased. But the fact that Negroes who, under the present liberalized policy, have only recently entered formerly white progression lines are forced to compete with white employees for promotion on the basis of "job seniority" continues, in each case of such competition, the discriminatory effect of the long history of the relegation of those Negroes to other, less desirable lines.[77]

Therefore, the present effect of past discrimination[78] was deemed a pre-

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[74] This present-effects doctrine is relevant to women as well as blacks and other minorities. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (stripping women employees of accumulated seniority while on pregnancy leave was a burden not placed on male workers and constituted an unlawful employment practice); Burwell v. Eastern Airlines, Inc., 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (held that pregnant flight attendants should not have to forfeit accumulated seniority). *Cf.* United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) (seniority system which gave a present effect to past discrimination could be treated as lawful by petitioner, United Airlines when respondent failed to file a timely charge, and the pre-Act discrimination, alone, had no present legal consequences).

[75] 279 F. Supp. at 516.

[76] 282 F. Supp. 39 (E.D. La. 1968). At the Crown Zellerbach Corporation's plant to Bogalusa, there was prior intentional discrimination, which was perpetuated by a job-seniority system rather than a system based on mill-wide seniority.

[77] *Id.* at 44.

[78] The justification for using a present-effects-of-past-discrimination test is explained by the following analogy:

> Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.
>
> Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.
>
> If a fair race is one where everyone has an equal chance to win, the race is not fair even though it is now run with fair rules . . . .
>
> Stopping the race and starting over would involve a wholesale redistribution of physical and human wealth. This only happens in real revolutions, if ever. This

sent violation of Title VII, and 703(h) did not protect this situation from the reach of Title VII.[79]

The Supreme Court first gave attention to the "present effects" concept and its relationship to seniority in *Franks v. Bowman Transportation Co.*[80] In *Franks*, the discriminatory practice involved discriminatory hiring rather than a discriminatory seniority system,[81] but the effects of the hiring policy were perpetuated by the seniority system.[82] The discriminatory practice[83] prevented black applicants, through hiring, transfer,

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leaves us with the choice of handicapping those who benefitted from the previous handicaps. Discrimination against someone unfortunately always means discrimination in favor of someone else. The person gaining from discrimination may not be the discriminator, but she or he will have to pay part of the price of eliminating discrimination. This is true regardless of which technique is chosen to eliminate the current effects of past discrimination . . . .

The need to practice discrimination (positive or negative) to eliminate the effects of past discrimination is one of the unfortunate costs of past discrimination. To end discrimination is not to create "equal opportunity."

L. THUROW, THE ZERO SUM SOCIETY 188-89 (1980).

[79] The district court stated:

Where a seniority system has the effect of perpetuating discrimination and concentrating or "telescoping" the effect of past years of discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system.

Local 189, 282 F. Supp. at 44 (emphasis in original).

[80] 424 U.S. 747 (1976). The main issue in this case was whether petitioners could be awarded retroactive seniority to the date of their applications for employment. In order to decide this issue, the Court discussed the protection afforded seniority systems, in general, under 703(h). The Court concluded that this section does not bar remedial seniority dated back to the date of application. *Id.* at 762. *Cf.* Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969):

The shaping of meaningful remedies for racial discrimination in seniority systems is difficult . . . . [W]hite and black employees contest for scarce job opportunities . . . . In addition, it pits the civil rights movement against the labor movement at the institutional level and weakens the liberal-labor coalition, which has been so influential at the political level.

Id. at 268-69.

[81] 424 U.S. at 757-58.

[82] *Id.* at 751.

[83]

[A] pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.

The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . .

110 CONG. REC. 14,270 (1964) (remarks of Senator Humphrey).

and discharge, from entering over-the-road[84] truck-driving positions.[85] After discussing the legislative history of section 703(h), the Court said:

> [I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.[86]

The Court continued by explaining that section 703(h) was not meant to "modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved."[87] This accords with *Quarles* to the extent that the present effects of past discrimination warrant remedial action.

An analogous line of reasoning was used regarding employment testing in *Griggs v. Duke Power Co.*[88] While testing has been treated differently in the case law,[89] the issue of intent in *Griggs* is still relevant for analysis at this point. *Griggs* was brought by the black employees at Duke Power Company's Dan River Steam Station.[90] The employees felt the testing procedure used by the company discriminated against them.

Before the effective date of Title VII, there had been open discrimination. The company operated five departments[91] but employed blacks only in the labor department "where the highest paying jobs paid less than the lowest paying jobs in the other four . . . departments in which only whites were employed."[92] Prior to 1965, the company required that employees have a high- school education for all but the labor department.

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[84] Over-the-road drivers, also known as "line drivers," engage in long-distance hauling. 431 U.S. at 329 n.3.

[85] 424 U.S. at 751. This seems to have been a common practice that was perpetuated by employers and unions in the trucking business. In International B'hd. of Teamsters v. United States, "the company . . . *did not employ a Negro on a regular basis as a line driver until 1969.*" 431 U.S. at 337 (emphasis in original).

[86] 424 U.S. at 761.

[87] *Id.* at 761-62.

[88] 401 U.S. 424 (1971).

[89] *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (giving deference to EEOC validation studies for showing correlation to the relevant jobs); Washington v. Davis, 426 U.S. 229 (1976) (The disproportionate impact of a testing procedure was analyzed under the Equal Protection clause); Guardians Ass'n. of New York City v. Civil Serv. Comm'n., 630 F.2d 79 (2d Cer. 1979) (where testing is unrelated to job performance, Title VII has been violated).

[90] 401 U.S. at 426. The petitioners were 13 of the 14 black employees at the Dan River Station in Draper, North Carolina. The total number of employees at this plant was 95. *Id.*

[91] *Id.* at 427. The five departments were: Labor, Coal Handling, Operations, Maintenance, and Laboratory and Test.

[92] *Id.* (footnote omitted). The first assignment of a black worker to a department outside of Labor occurred in August, 1966. This was five months after charges had been filed with the EEOC. *Id.* at 427 n.2.

On July 2, 1965, the effective date of Title VII, the company instituted a new policy, which provided that employees must achieve a satisfactory score on two professionally prepared aptitude tests in order to qualify for the "white" departments.[93] This system effectively barred black employees from certain departments and favored white employees.

The Supreme Court concluded that "practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[94] This language clearly does not limit the scope of the decision to employment tests. The Court explained that Congress required the removal of barriers to employment when they invidiously discriminate.[95] *Griggs* illustrates the Supreme Court's lack of emphasis on "intent" to discriminate and focuses on the "effects" of discrimination. The Court explicitly stated that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[96] The Supreme Court interpreted "the thrust of the Act [as going] to the *consequences* of employment practices, not simply the motivation."[97] Both seniority systems and testing schemes are a practice of employment. Thus *Griggs* has precedential value for cases concerning the discriminatory effects of seniority systems.[98]

The above case law points out that no present intent to discriminate was needed.[99] The present effect of a prior intent was sufficient to bring section 703(h) into play. The above cases did not even attempt to find a present intent based upon the continuation of discriminatory practices. The fact that one group was perpetually held in an inferior position was sufficient for the courts to find a violation of Title VII.[100]

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[93] *Id.* at 427-28. Neither test was geared toward measuring aptitude for a particular job. *Id.* at 428. The tests also bore no relationship to successful work performance. *Id.* at 431.

[94] *Id.* at 430 (emphasis added).

[95] *Id.* at 431.

[96] *Id.* The Court explained further that business necessity might make such a testing system lawful under Title VII, but that none was shown. Seniority systems are necessary for business but they can be amended through collective bargaining to abolish any discriminatory effects. In situations where seniority systems are facially neutral but where past discrimination "freezes" blacks into an inferior position, the situation can be equalized by remedial action to put the black workers in the position they would have been in had there been no discrimination. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[97] 401 U.S. at 432 (emphasis in original).

[98] This is especially relevant because employment testing and seniority systems are encompassed within the same subsection of Title VII.

[99] "Acts taken before the effective date of Title VII (July 2, 1965) are relevant for the purpose of showing an intent manifested since that date to discriminate against blacks." Johnson v. Olin Corp., 484 F. Supp. 577, 579-80 (S.D. Tex. 1980).

[100] Six courts of appeals agreed that § 703(h) did not immunize seniority systems that perpetuated the effects of past discrimination. These courts have indicated this position in more than 30 cases without one dissent. *See* 431 U.S. at 378 n.2 (Marshall, J., concurring in part and dissenting in part).

The Supreme Court, in 1976, began to modify the stance set out in cases that had held that section 703(h) did not immunize the present effect of past discrimination perpetuated by a seniority system.[101] In *International Brotherhood of Teamsters v. United States*, the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination,"[102] although the Court conceded that there is much support for the *Quarles* and *Griggs* rationale.[103]

Teamsters presented a fact situation analogous to that in *Franks*. Both cases concerned seniority systems in the trucking industry. The seniority system in *Teamsters* measured seniority by bargaining unit for competitive purposes.[104] Seniority was used in bidding for particular runs, in protection from layoff,[105] and in determining the order in which employees were recalled from layoff. Further, if an employee wished to transfer to a line-driving job from a city driver or service position, the employee had to forfeit all accumulated seniority.[106] Because of prior discrimination[107] whereby blacks[108] were not hired into line-driver positions, the seniority system's present effect was to perpetuate segregation in the departments. The disincentive to transfer to another position applied equally to all workers, but because they were previously "locked out" of line-driving jobs, blacks suffered and most, as they had been denied the opportunity to enter this department when initially hired.

The district court and the court of appeals, relying on prior case law, held that this built-in disadvantage was a continuing violation of Title VII.[109] The Supreme Court, however, said it would be a violation of Title

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[101] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

[102] 431 U.S. at 354.

[103] *Id.* at 346 n.28.

[104] *Id.* at 343.

[105] Continental Can of Harvey, Louisiana had an all-white work force (except for two black workers hired during World War II) until 1965. By 1971, blacks numbered 50 out of the 400 employees. In the next two years, there were massive layoffs according to seniority. The work force decreased to 152 employees, all being white except for the two blacks hired during the war. Watkins v. United Steel Workers, Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd on other grounds*, 516 F.2d 41 (5th Cir. 1975). This exemplifies the effect of seniority on layoffs.

[106] 431 U.S. at 344.

[107] As of March 31, 1977 (soon after this suit was commenced) the company had 6,472 employees. Of these, 314 (5%) were black, and 257 (4%) were Spanish-surnamed Americans. There were 1,828 positions as linedrivers and of these, eight (0.4%) were filled by black employees and five (0.3%) were filled by Spanish-surnamed employees. All of the black employees on the line-driver jobs were hired after this litigation began. *Id.* at 337.

[108] For the sake of brevity, reference is made only to blacks, although the discrimination was directed against Spanish-surnamed individuals as well.

[109] 431 U.S. at 331-33.

VII were it not for section 703(h).[110] The Court stated that the *Griggs* rationale would not apply. *Griggs* held that "practices which are fair in form, but discriminatory in operation"[111] are those which perpetuate the effects of prior discrimination, and cannot be maintained if they "'freeze' the status quo."[112] The *Teamsters* Court stated that this would be a *Griggs* situation but for the presence of the seniority system.[113]

The Court relied on *Teamsters* when it decided *American Tobacco*, but took the rationale one step further, by determining that the impact of past discrimination is not enough. Actual *intent* to discriminate must be proved.[114] The *American Tobacco* Court decided that the legislative history was unclear, and instead considered the "plain language" of the statute.[115]

Emphasis was placed on the language that the exemption will apply "provided that such differences *are not the result of an intention to discriminate* because of race, color, religion, sex, or national origin."[116] *American Tobacco* interpreted this language as requiring a present intent to discriminate. The Court clearly could have interpreted the language as requiring intent in the initial development of the seniority system.[117] In all of these cases, it is undisputed that initially there was an intent to discriminate and that this intent was maintained in the seniority system.[118] Therefore, courts should impute the initial intent into subsequent conduct which perpetuates the discriminatory intent, and thus hold the conduct unlawful.

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[110] *Id.* at 349.

[111] 401 U.S. at 431.

[112] *Id.* at 430.

[113] 431 U.S. at 349. The Court recognized that

> [t]his disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

Id. at 350 (quoting *Griggs*, 401 U.S. at 430).

[114] 456 U.S. at 65. "Under 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; *actual intent* to discriminate must be proved." *Id.* (emphasis added).

[115] *Id.* at 68.

[116] 42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

[117] *See* 431 U.S. at 382 (Marshall, J., concurring in part and dissenting in part) (Justice Marshall's opinion points out that under this interpretation the seniority system would not fall under the exemption provided by § 703(h)).

[118] Title VII has a short statute of limitations, one reason plaintiffs could not rely on initial intent in formulating a challenge to seniority systems. The statute of limitations requires that a complaint "be filed [with the EEOC] within 180 days after the alleged unlawful employment practice occurred," or within 210 days if filed with the state. 42 U.S.C. § 2000e-5(e) (1976). [To interpret Title VII as requiring this intent, Title VII's prohibition on actions adversely affecting particular employees would be undercut.] *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1267-68 (1967).

The requirement of present intent to discriminate is an extremely heavy burden for plaintiffs to carry in order to challenge a seniority system. As succinctly stated by one court: "Seldom does a party intent on practicing discrimination declare or announce his purpose. It is more likely that methods subtle and elusive are used to accomplish the desired discrimination."[119] Not only would potential plaintiffs need to prove that employers intended to discriminate against them, but also that differences in compensation, terms, conditions, or privileges of employment were the result of this intention.

> Placing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively 'freeze[s] an entire generation of Negro employees into discriminatory patterns that existed before the Act.' "[120]

To require a showing of intent places a barrier in the way of achieving equal employment opportunity. Title VII's purpose was the elimination of "those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[121] Attempts to effectuate this purpose can only be frustrated by having to prove intent rather than discriminatory impact. The *American Tobacco* decision heavily burdens a plaintiff bringing an action under section 703(h). The sections of Title VII which define discrimination do not even refer to intent.[122] Instead, Title VII makes unlawful practices which "tend to deprive" or "adversely affect" the employee because of unlawful classifications.[123] Absent is language referring to an employer's reasons for

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[119] Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COM. L. REV. 473, 480 (1966) (quoting Marrano Constr. Co. v. New York State Comm'n for Human Rights, 45 Misc. 2d 1081, 1085, 259 N.Y.S.2d 4, 9 (1965)).

[120] Pullman-Standard v. Swint, 456 U.S. 273 (1982) (Marshall, J., dissenting) (quoting *Quarles*, 279 F. Supp. at 505).

[121] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[122] Section 703(a)(2) and (c)(2) of Title VII define discrimination as follows:

> to limit, segregate or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or *tend to deprive* any individual of employment opportunities, or would limit such employment opportunities, or otherwise *adversely affect* his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(c)(2) (1976) (emphasis added). However, some have interpreted the language, "because of . . . race" as requiring intent. *See* Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791, 796.

[123] Stated in another way, "Title VII is result-oriented, and it looks to the effect of practices and not the presence of discriminatory motive behind them in determining compliance with its mandates." OVERVIEW OF LEGAL ISSUES, *supra* note 11, at 11.

his discriminatory practice. This language "strongly suggest[s] the coverage of all practices having a discriminatory effect."[124] Therefore, the requirement of intent in *American Tobacco* is inapposite to the purpose of Title VII and places a heavy burden on challengers of a seniority system.[125] After *American Tobacco*, any challenge to a seniority system under Title VII will require litigating the issue of whether there was discriminatory intent,[126] adversely affecting already-overloaded court dockets.

2. The Extension of Section 703(h)'s Reach to Post-Act Adoption of a Bona Fide Seniority System

The *American Tobacco* Court effectively broadened the reach of the seniority exemption by holding that section 703(h) exempts post-Act, as well as pre-Act, adoption of seniority systems.[127] The Court rejected the Equal Employment Opportunity Commission's interpretation that section 703(h) protects the post-Act *application* of seniority systems but not the post-Act *adoption* of seniority systems.[128] Instead, the Court emphasized the "plain language" of the statute, which makes no explicit distinctions between pre-Act or post-Act seniority systems.[129] By holding that the seniority exemption applied to both pre- and post-Act systems, the Court did not preclude its application to the *American Tobacco* lines-of-progression system—a post-Act seniority system.

The Court expressed a reluctance to transform what it considered a "definitional clause"[130] into a "grandfather clause."[131] But as the dissent

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[124] Cooper & Sobol, *supra* note 9, at 1674.

[125] The plaintiff has the burden of proving a prima facie case of racial discrimination by a preponderance of the evidence. 411 U.S. at 802. The *McDonnell Douglas* Court said this may be proved by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. The Court explained that the facts, and thus the criteria, necessary to sustain a prima facie case will differ from case to case. What is significant is that there is no reference, implied or explicit, to intent. Once the initial burden is met, the burden then shifts to the defendant (employer) "to articulate some legitimate, nondiscriminatory reason" for its conduct. *Id.*

[126] *See Pullman-Standard*, 456 U.S. at 273, 287-88 (1982) (intent is a pure question of fact).

[127] 456 U.S. at 77.

[128] *Id.* at 68.

[129] *See* 42 U.S.C. § 2000e-2(h) (1976).

[130] In Franks v. Bowman Transp. Co., the Court discussed the definitional aspect of § 703(h):

> [I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-

pointed out, the plain language of the clause reads that "it shall not be an unlawful employment practice for an employer to *apply* different standards."[132] This can be interpreted as meaning that the application of an already-existing seniority system would be protected, as opposed to the protection of a wholly new system adopted after the effective date of the Act.[133]

The dissent's interpretation is in accordance with the legislative history, which emphasizes protecting "established" seniority rights. "Title VII would have no effect on seniority rights existing at the time it takes effect."[134] The interpretive memorandum submitted by Senators Clark and Case explains that "Title VII would have no effect on established seniority rights. The effect is prospective and not retrospective."[135] The *American Tobacco* majority conceded that "statements made prior to the introduction of section 703(h) by proponents of Title VII are evidence of the meaning of section 703(h)."[136] Therefore, because emphasis was placed on protecting established rights, and no emphasis was placed on future seniority systems, the obvious conclusion would be that section 703(h) limits its protection to seniority systems already in existence. But the majority did not reach the conclusion that section 703(h) was limited to pre-Act systems. Rather, the *American Tobacco* Court extended the reach of section 703(h) to post-Act systems, contrary to the purposes of Title VII. Section 703(h) was merely added to give narrow protection to existing seniority systems. There is no mention of the adoption of post-Act systems in the history of section 703(h) because this would have come under the affirmative provisions of Title VII, especially in light of the fact that the provisions guide unions[137] as well as employers.[138] The section refers solely to the *employer's* practices. Employers are usually responsible for the application of a seniority system. The employer and union are ordinarily responsible for the *adoption* of a seniority system,

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Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

424 U.S. at 761.

[131] 456 U.S. at 69. A "grandfather clause" is a "[p]rovision in a new law or regulation exempting those already in or part of the existing system which is being regulated." BLACK'S LAW DICTIONARY, 629 (rev. 5th ed. 1971). Such clauses are "calculated to prevent hardship by saving accrued rights and interests from the operation of a new rule." 2A C. SANDS STATUTES AND STATUTORY CONSTRUCTION § 47.12 (4th ed. Supp. 1983).

[132] *Id.* at 80 (Brennan, J., dissenting) (quoting 42 U.S.C. § 2003-2(h)) (emphasis added).

[133] *Accord* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

[134] 110 CONG. REC. 7207 (1964).

[135] 110 CONG. REC. 7213 (1964). The majority opinion omits the second sentence of this quotation, thereby misinterpreting the legislative history. *See* 456 U.S. at 73.

[136] 456 U.S. at 73 n.11.

[137] 42 U.S.C. § 2000e-2(c)(2) (1976).

[138] *Id.* at § 2000e-2(a)(2).

and may both be held liable for discrimination under Title VII.[139] Together, the union and employer negotiate the adoption of a seniority system as part of the collective bargaining agreement. The seniority system is a "term, condition, or privilege" of employment in which there can be no tendency to deprive an employee of his status as an employee, because of unlawful criteria.[140] Therefore, section 703(h) protects only seniority systems already in effect.

IV. What is a Bona Fide Seniority System?

It is clear that the *American Tobacco* decision places a heavy burden upon employees who wish to challenge a seniority system that is allegedly discriminatory. These employees have the onerous task of proving that a seniority system is either discriminatory on its face, was instituted and maintained for intentionally discriminatory purposes, or is not "bona fide" within the meaning of section 703(h).

Facially discriminatory seniority systems are rare, as employers have increased their awareness of the potential legal problems that arise from blatantly discriminatory seniority systems. Further, to prove that a seniority system is intentionally discriminatory is almost impossible:[141] "Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs 'on a more sophisticated and subtle level,' the effects of which are often as cruel and 'devastating as the most crude form of discrimination.' "[142] Therefore, only the last option of proving that a seniority system is not "bona fide," has potential as a strategy for Title VII litigants.

The *American Tobacco* Court refused to address the issue of what constitutes a bona fide seniority system.[143] In light of the Court's emphasis on the "plain language" of the statute, it is anomalous that the Court would not consider the issue.[144] The statute explicitly states that a senior-

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[139] 456 U.S. at 80. (Brennan, J., dissenting).

[140] *Id.*

[141] *Cf.* General Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375, 413 (1982) (Marshall, J., dissenting). This case involved a discrimination suit brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981, but is relevant in discussing the requirement of proving "intent" under Title VII. As noted by Justice Marshall: "The profound national policy of blotting out all vestiges of racial discrimination, [is] no less frustrated when equal opportunities are denied through cleverly masked or merely insensitive practices, where proof of actual intent is nearly impossible to obtain . . . ." *Id.*

[142] *Id.* at 412 (quoting Pennsylvania v. Local 542 Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337 (E.D. Pa. 1978), *aff'd*, 648 F.2d 922 (3d Cir. 1981)).

[143] 456 U.S. at 68 n.2.

[144] The majority demonstrated its focus on statutory language by stating: As in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we must assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Id.* at 68 (citations omitted).

ity system must be "bona fide" to come under the seniority exemption.[145] The literal meaning of "bona fide" is "good faith,"[146] but this definition does not help with the practical application of the statute to specific fact situations. The courts have grappled with defining "bona fide," but no operational definition has emerged which could serve as a guideline for potential litigants. Furthermore, neither Title VII nor its legislative history offers any help in this area.

In *Quarles*, the district court reasoned that "bona fide" must mean a lack of discrimination.[147] The court held that a "departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority systems."[148] Because the Philip Morris Company had established its seniority lists based on a policy of segregation, and continued to use those lists after the effective date of Title VII, its system was outside the protection afforded bona fide seniority plans.[149]

The *Quarles* court based its decision on the language of section 703(h): ". . . provided that such differences are not the result of an intention to discriminate."[150] The "intent" indicated in the statute was interpreted as referring to the initial discriminatory hiring decisions which were maintained by the current seniority system.[151] In other words, *Quarles* stands for the proposition that a seniority system which perpetuates the effects of past discrimination cannot be bona fide.[152]

The *Teamsters* decision modified the *Quarles* definition of a bona fide seniority system. In *Teamsters*, the Court rejected the argument that "no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide.' "[153] However, the *Teamsters* Court incorporated the *Quarles* "genesis" test into its analysis and found the seniority system valid. The *factors* that *Teamsters* relied upon to make its decision were best set out

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[145] "[I]t shall not be an unlawful employment practice for an employer to apply different standards . . . of employment pursuant to a *bona fide* seniority or merit system." 42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

[146] Generally, "bona fide" means "with good faith; without fraud or deception; genuine." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 206 (2d ed. 1978). Likewise, a legal definition provides: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . ." BLACK'S LAW DICTIONARY 160 (rev. 5th ed. 1979).

[147] 279 F. Supp. at 517. What actually constitutes discrimination also has not been sufficiently defined. *See supra* notes 30-31 and accompanying text.

[148] *Id.* One commentator has asked whether any "seniority system set up prior to the Civil Rights Act which deliberately excluded Negroes [can] ever be bona fide." Rachlin, *supra* note 119, at 480.

[149] 279 F. Supp. at 517.

[150] 42 U.S.C. § 2000e-2(h) (1976).

[151] 279 F. Supp. at 517. *See* Comment, *supra* note 122, at 802 n.56.

[152] 279 F. Supp. at 517-18.

[153] 431 U.S. at 353. "To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted." *Id.*

in *James v. Stockham Valves & Fittings Co.*[154] as:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units; 2) whether the seniority units are in the same or separate bargaining units (if the later, whether that structure is rational and in conformance with industry practice); 3) whether the seniority system had its genesis in racial discrimination; and 4) whether the system was negotiated and has been maintained free from any illegal purpose.[155]

The *Teamsters* Court applied these four elements to the facts and found the system to be a bona fide seniority system. The first factor was satisfied because the seniority system treated all employees equally.[156] The seniority system in question had the effect of locking workers out of better jobs by forcing them to lose accumulated seniority. However, the Court held that this disincentive to transfer worked against white workers as well as black workers.[157] There is an assumption inherent in this reasoning that a neutral hiring practice will, in time, result in a representational racial population.[158] To view the seniority system under this assumption is to ignore the pattern of segregation that existed prior to the current system. Under this pattern, blacks were systematically kept out. One commentator explains:

> In most cases . . . seniority systems discriminate because of racist hiring and assignment practices. Where those racist practices are absent, almost any system can pass muster under Title VII. Thus, the hunt for "neutral principles of seniority" generated by this concept of "bona fide seniority systems" must be put aside in favor of a sharp look at the facts of the case before the court.[159]

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[154] 559 F.2d 311, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

[155] *Id.* The *James* court extrapolated these four factors from the following passage in *Teamsters*:

> The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all . . . . The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose.

431 U.S. at 355-56 (footnotes omitted).

[156] 431 U.S. at 355-56. In other words, the seniority system was facially neutral.

[157] *Id.* at 356.

[158] *Id.* at 339 n.20. *Accord* EEOC v. Navajo Ref. Co., 593 F.2d 988, 991-92 (10th Cir. 1979) (the company required a high school education and a passing grade on a test as a prerequisite to employment, but petitioners failed to show the testing resulted in discrimination in fact).

[159] Blumrosen, *supra* note 80, at 290.

The argument would follow that although a seniority system might be facially neutral, if it perpetuated past discrimination due to a disincentive to transfer for fear of losing accumulated seniority, such system would not be bona fide.[160] While blacks newly hired for line-driver jobs would be able to compete equally with newly-hired whites, "Title VII was not meant to freeze an entire generation of black employees into discriminatory positions."[161]

The *Teamsters* Court decided that the second factor of its test was met in that maintaining separate bargaining units for line-drivers was rational and in conformity with industry practice. The third factor, that the seniority system did not have its genesis in racial discrimination, and the fourth factor, that the seniority structure was negotiated and had been maintained free from any illegal purpose, were conceded by the parties.[162]

In *James*, the parties were not as willing to concede these factors as the parties were in *Teamsters*. The claim was that "Stockham's departmental seniority system, which [was] neutral on its face, [was] unlawful because it accentuate[d] the effects of Stockham's discriminatory job assignment practices."[163] As in the system in *American Tobacco*, employees who wished to transfer to a new department lost all seniority accumulated at the time of the transfer. In other words, "black employees must choose to commit 'seniority suicide' "[164] to change departments.

The *James* court applied the *Teamsters* elements to the facts at hand.[165] The *James* court noted that the crux of whether there has been purposeful discrimination depends on whether the seniority system is or is not bona fide.[166] The court further stated that there should be a case-by-case analysis of whether a seniority system is bona fide under section 703(h).[167] However, the court remanded the case to the district court for a determination of whether the system was bona fide, since evidence had not previously been presented on the issue.[168] Unlike the *American To-*

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[160] The *Teamsters* Court did not follow this argument. Instead, the Court stated that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.

There is some question about the use of the word "legitimate" in the statement above. *See American Tobacco Co.*, 453 U.S. at 87 n.2 (Stevens, J., dissenting) ("If a seniority system is not 'legitimate,' it is not 'bona fide' within the meaning of the Act.").

[161] Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

[162] 431 U.S. at 356.

[163] James v. Stockham Valves & Fitting Co., 559 F.2d 310, 347 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1977).

[164] *Id.* at 348.

[165] *See supra* note 155.

[166] 559 F.2d at 351. "A system designed or operated to discriminate on an illegal basis is not a 'bona fide' system." Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978).

[167] 559 F.2d at 352 ("The Facts of a particular seniority unit are critical to a determination whether the system is bona fide.").

[168] *Id.* at 353. There are many examples of cases appealed to the federal circuit courts and then remanded in light of *Teamsters* and *James*. *See, e.g.*, California Brewers Assn. v. Bry-

bacco Court, the *James* court left the guidelines gleaned from *Teamsters* for future courts' consideration.

Wattleton v. International Brotherhood of Boiler Makers[169] was decided in light of *James* and *Teamsters*. There the district court found the seniority system was not bona fide and thus not entitled to section 703(h) treatment, holding "that the seniority systems negotiated between [the company] and the [union] have and were intended to have a disparate impact on black workers."[170] The Court of Appeals for the Seventh Circuit upheld the district court's findings and stated that "it is clearly a violation . . . for a union . . . to maintain a seniority system for the purpose of excluding Negroes from membership because of their race; and certainly, such a system is not protected by the exception in section 703[(h)] of Title VII."[171]

The reasoning in *Wattleton* is not significantly different from that used in finding the intent required by *American Tobacco*. Although *Wattleton* emphasizes the fact that the seniority system was maintained in order to have a disparate impact on blacks, it also gives weight to the fact that the system was initially negotiated with the purpose of discriminating. The question remains whether there can ever be a separate cause of action to prove a seniority system is not bona fide without having to prove intentional discrimination. It seems that "the issue of whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide."[172]

In *United States v. Georgia Power Co.*,[173] the court seemed to use an intent *and* an effect analysis to determine whether the system was bona fide. The court applied the *James* four-part test and found that the seniority system failed all four segments.[174] Under the first factor, whether the system discouraged all employees equally from transferring, the system was found to be facially neutral. However, the court held that this neutrality "was but a mask for the gross inequality beneath."[175] This con-

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ant, 444 U.S. 598, 610-11 (1979); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1344 (11th Cir. 1983); EEOC v. Ball Corp., 661 F.2d 531, 539 (6th Cir. 1981); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1192 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978)

[169] Wattleton v. International Bhd. of Boiler Makers, 686 F.2d 586 (7th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1199 (1983).

[170] 520 F. Supp. at 1347. The district court found that the seniority system, which was collectively bargained for, was "negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the [union]." *Id.* at 1346.

[171] 686 F.2d at 593.

[172] United States v. Georgia Power Co., 634 F.2d 929, 934 (5th Cir. 1981) (quoting James v. Stockham Valves & Fitting Co., 559 F.2d 310, 351 (5th Cir. 1977)).

[173] 634 F.2d 929 (5th Cir. 1981).

[174] *Id.* at 935-36.

[175] *Id.* at 935.

clusion was reached because only five blacks had ever been hired in any position higher than the lowest job classifications.[176] This system effectively "locked" black workers into the lower-paying jobs.

The second factor, referring to separate bargaining units, was not applied to the facts at hand because the separate units had been consolidated.[177] Therefore the court did not consider this factor and proceeded to the third element to determine whether the seniority system had its roots in racial discrimination. In this case the facts provided a genesis in "an era of overt racial discrimination . . . when by formal policy blacks were prevented from holding any jobs other than those in the four lowest, most menial classifications."[178] These classifications were not connected to any line of progression as the upper-level classifications were. The formal policy found in this case would surely be evidence of intentional discrimination. It is at this level of the *James* inquiry that the concept of intentional discrimination enters the analysis of whether a system is bona fide.

The "genesis" portion of the test should be limited to determining whether there was general discrimination practiced at the time the seniority system was first instituted. To require proof of actual, intentional discrimination would raise a plaintiff's burden to a level of nearly that necessary to prove present intentional discrimination. Facts supporting a claim of intentional discrimination present at the genesis of the seniority system, should make it possible to prove intentional discrimination; it should be unnecessary to resort to a cause of action which attempts to prove the system was not bona fide.

The Supreme Court followed previous decisions and upheld a requirement of intent to discriminate in *Pullman-Standard v. Swint*,[179] a case originally brought to challenge the departmental seniority system maintained at the Pullman-Standard Company. The plaintiff claimed that the system perpetuated the effects of past discrimination.[180]

At trial, the United States District Court for the Northern District of Alabama held that the seniority system was valid, and thus bona fide under 703(h).[181] In reversing, the Fifth Circuit Court of Appeals applied the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.[182] The Supreme Court then overturned the appellate court decision because that court had made an independent determina-

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[176] *Id. Cf. Teamsters*, where those discouraged from transferring to better positions were not predominantly members of minority groups. 431 U.S. at 353-56.

[177] 634 F.2d at 936.

[178] *Id.*

[179] 456 U.S. 273 (1982).

[180] Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980).

[181] *Id.* at 528.

[182] "There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose." *Id.* at 533.

tion beyond the scope of the "clearly erroneous" rule.[183]

All three courts applied the *James* test in their consideration of the seniority system yet came to differing results. The district court found the seniority system to be bona fide. The appellate court came to an opposite conclusion. "There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the [union] in 1941 was to exclude black workers from its bargaining unit."[184] The completely opposite conclusions rendered from identical criteria as applied to identical facts point out the need for an operational definition of "bona fide."

The Supreme Court in *Pullman-Standard*, as in *American Tobacco*, had the ideal opportunity to define fully "bona fide." Instead of seizing the chance offered by favorable fact patterns, the Court merely reiterated its requirement of a showing of intent. "Thus any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted because of its racially discriminatory impact?"[185]

Until a working definition of "bona fide" is developed by the Court, plaintiffs will be faced with yet another barrier in their attempts to challenge the legality of seniority systems. Plaintiffs need a definition of "bona fide" in order to know whether they may have an alternate litigation strategy, or whether they must prove intentional discrimination in all circumstances.[186] Without a working definition of "bona fide," the language of section 703(h) is emasculated and void of purpose.

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[183] 456 U.S. at 290-93. The discussion of Rule 52(a) was the main thrust of the Court's discussion; however, its treatment of the facts is relevant to a discussion of bona fide seniority systems.

[184] 624 F.2d at 533. Continuing, the court stated that "the system [was] not legally valid under § 703(h) of Title VII." *Id.* at 534.

[185] 456 U.S. at 277. The Court conceded that evidence of discriminatory impact may enter the analysis:

> This is not to say that discriminatory impact is not part of the evidence to be considered by the trial court in reaching a finding on whether there was such a discriminatory intent as a factual matter. . . . Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

Id. at 289-90 (footnote omitted). Justices Stevens, Marshall, and Blackmun dissented on grounds similar to those of their dissents in *American Tobacco*. *See* 456 U.S. at 77-90.

[186] For cases which invalidated the seniority system without actually proving an intent to discriminate, see Scarlett v. Seaboard Coast Line R.R., 676 F.2d 1043, 1052 (5th Cir. 1982). According to the Fifth Circuit: "In this case the differing treatment of black trainmen was not the product of applying the facially neutral provision regarding promotion. Rather, the discrimination was the result of the defendants' consistent disregard of the applicability of that provision to black trainmen. Hence . . . § 703(h) offers no immunity . . . ." *Id. See also* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 253 (2d Cir. 1980) (concluding that the seniority provisions did not measure what they purported to measure. Therefore the problem is "not that [the seniority system] perpetuates *the effects* of past discrimination, but rather that it perpetuated discrimination.").

V. The Practical Application of *American Tobacco v. Patterson* and Recommendation for Change

A. American Tobacco *Analysis Applied to* Quarles

One method of understanding the impact of *American Tobacco* is to apply its rationale to an earlier case. It becomes clear that analyzing the facts of *Quarles* in light of *American Tobacco* would result in a different holding. An *American Tobacco* analysis requires 1) that there be a present intent to discriminate, and 2) that section 703(h) extend its protection to post-Act, as well as pre-Act seniority systems.[187]

In *Quarles*, the court held that the employees[188] were discriminated against with respect to advancement, transfer, and seniority.[189] Seniority provisions were covered in a collective bargaining agreement, which took effect February 1, 1965, before the effective date of Title VII.[190] The company used both company and departmental seniority, but for purposes of promotion, transfer, and preferential shifts, departmental seniority was used as the measure.[191] The use of this measure had a disparate impact on blacks, who had historically been prevented from entering the fabrication department. In order to transfer, employees were forced to forego accumulated departmental seniority. The *Quarles* court granted relief to the plaintiffs, but under an *American Tobacco* analysis, no relief would be forthcoming.

The seniority system was facially neutral. It was the past intent to keep blacks out that presently caused the disparate impact. Consequently, there was no present intent to discriminate, because the seniority system affected blacks and whites equally. Under *American Tobacco*, a present intent cannot be inferred from a past intent.[192] Further, the seniority lists in *Quarles* went into practice prior to the effective date of Title VII, so section 703(h) would protect this system.[193] In contrast, the *Quarles* court held the present effects of past discrimination were sufficient to show an unlawful employment practice.[194] Therefore, under an *American Tobacco* analysis, *Quarles* would have been decided against the plaintiffs.

This case illustrates the broad reach of the *American Tobacco* decision.

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[187] *See* 456 U.S. 65, 76-77. Previous cases could also be discussed in light of whether their systems are bona fide, but because the *American Tobacco* Court chose to ignore this analysis, such an analysis will not be undertaken here.

[188] The plaintiffs were a class of black employees who were hired in the prefabrication department prior to January 1, 1966. 279 F. Supp. at 507.

[189] *Id.*

[190] *Id.* at 511. This agreement was modified by a "Memorandum of Understanding" on March 7, 1966. *Id.*

[191] *Id.* at 513.

[192] 456 U.S. at 70.

[193] 279 F. Supp. at 517-18. The *Quarles* Court further held that § 703(h) would not apply because the seniority system was not "bona fide". *Id.*

[194] *Id.* at 518.

The Court, in effect, has given a ticket to employers and unions to utilize their seniority systems to enact racial preferences. The message to employers is merely that they must be sure to cloak any intent to discriminate in a facially neutral system. Further, companies can continually adopt new seniority plans knowing that they will be protected by the broad reach of section 703(h). Indeed, there is a need for change in the law regarding Title VII and section 703(h).

B. Collective Bargaining

Seniority systems are of "overriding importance" in collective bargaining agreements,[195] and the union's role in this type of agreement is affected by both Title VII and section 703(h). The union's role in negotiating collective bargaining contracts is crucial; this "provides the opportunity for discriminating in favor of some individuals and groups and against others."[196] Title VII prohibits discrimination in employment. If an unlawful seniority system is incorporated into the collective bargaining agreement, the union will have entered into an illegal, unenforceable contract.[197] The difficulty in interpreting section 703(h) and the problems with judicial interpretation of section 703(h) offer little guidance for the unions in their role as bargaining agent.

Seniority systems can be changed by agreement between the union and the employer.[198] A seniority system gives a status to individuals that is created by contract and may be terminated or modified by contract.[199] But the contract is not one that *all* the employees enter into voluntarily. "[R]ather, it is a *collective* agreement, a contract between an employer and a union which owes an obligation of fair representation to its members, but which need not obtain the individual consent of any one of them to the terms of the bargain."[200] The basic limitation on the union is a

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[195] Humphrey v. Moore, 375 U.S. 335, 346 (1964). *See also* Trans World Airlines v. Hardison, 432 U.S. 63, 79 (1977) (seniority provisions "are universally included in these contracts"); Aaron, *supra* note 7, at 1534 ("[T]he seniority principle is so important that it is embodied in virtually every collective agreement. It is thus the product of collective bargaining; it owes its very existence to the collective agreement.").

[196] Aaron, *supra* note 7, at 1535. "Subject only to the requirement of good faith, it may propose or agree to changes in existing seniority rights that are adverse and detrimental to the interests of some of the employees affected." *Id.* at 1536.

[197] Hairston v. McLean Trucking Co., 520 F.2d 226, 235 (4th Cir. 1975) (if bargaining agreements are in violation of the law, they are not binding).

[198] Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (where the Court decided that the union had the authority to give seniority credit to employees for pre-employment military service); *accord* Franks v. Bowman Transp. Co., 424 U.S. at 779 (1976).

[199] Aaron, *supra* note 7, at 1533.

[200] *Id.* The collective bargaining agreement subordinates the interests of the individual employee to the collective interests of all the employees in the bargaining unit. J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944).

duty of good faith.[201] This would allow the union to work against the wishes of an individual employee as long as it represented the group. This reflects a longstanding policy of allowing those chosen as representatives of employees and employers to exercise freedom of collective bargaining, and to adopt systems and conditions that suit their particular needs.[202] This freedom to bargain must extend to the creation of seniority systems because they reflect "not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry."[203]

But there are limitations inherent in Title VII and section 703(h) that go beyond a mere "good faith" obligation. A union must be aware, from the outset, of the requirements of Title VII in order to avoid litigation. "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert."[204] Title VII requires that minority interests in equal employment opportunity be protected. In fact, the union has a duty to negotiate actively for nondiscriminatory treatment of its minority workers.[205] The union's duty is implicit in Title VII because of the liability attaching to unions which discriminate.[206] The *American Tobacco* Court stated that section 703(h) reflects the balance between the freedom to bargain collectively, and the limitations of Title VII.[207] Yet difficulties inherent in section 703(h) make this a blind statement by the Court, especially in light of the fact that 703(h) offers no guidelines for negotiating seniority systems, but merely protects certain seniority systems from challenge.[208] Without further clarification of section 703(h), the unions and employers will not know if they are proceeding in an unlawful manner in negotiating seniority provisions.

On the other hand, employees seeking to remedy a discriminatory seniority system can attack the collective bargaining representation of the

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[201] Aaron, *supra* note 7, at 1534.

[202] This was the labor policy when the 1964 Civil Rights Act was passed. California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). *See also* United Steelworkers v. Weber, 443 U.S. 193, *reh'g denied*, 444 U.S. 889 (1979) (a voluntarily adopted affirmative action plan was permissible).

[203] 444 U.S. at 608. The *Teamsters* Court points out that seniority systems differ in the ways they measure time, depending on the needs of the industry. Further, the legislative history of § 703(h) does not show a preference for measuring seniority by plant, department, job, or lines or progression. 431 U.S. at 355 n.41.

[204] Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *accord* Patterson v. American Tobacco Co., 535 F.2d at 270.

[205] Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 989 (D.C. Cir. 1973). *See also* United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).

[206] 42 U.S.C. § 2000e-2(c) (1976).

[207] 456 U.S. at 77.

[208] The difficulties in interpreting what is a bona fide system and in determining whether § 703(h) extends to post-act systems is a concern for unions in collective bargaining. If a union does not know which systems are protected by § 703(h), it is not bargaining from a very strong position.

union as an alternative litigation strategy. Remedies for discrimination may be had through revision of the seniority structure.[209] "If the seniority system is amended rather than abolished, or if some other form of objective work allocation is adopted, . . . two labor interests—those of independence from the employer and union objectivity—are protected. Only the accrued seniority expectations of the incumbent white employees are disturbed."[210] The fact that the majority's expectations are violated is not grounds for denying seniority relief to the victims of discrimination. To do so would "frustrate the central 'make whole' objective of Title VII."[211] Further, seniority provisions in collective bargaining agreements do not grant vested property rights in employees.[212] Seniority rights can be modified when necessary.

Modification of the seniority system was the relief granted under Title VII in *Equal Employment Opportunity Commission v. United Air Lines*.[213] The court held that the union could not incorporate into the collective bargaining agreement seniority provisions which deterred minorities from transferring into other departments.[214] The court ordered the airline to use company-wide seniority for purposes of layoff and recall, and departmental seniority for other purposes.[215] The union asserted that this relief trammeled collective bargaining rights, but the court disagreed. Relying upon *Franks*, the court stated, "[I]t is well settled that seniority systems in collective bargaining agreements may be modified to provide relief under Title VII."[216]

This reasoning would have been appropriate in *American Tobacco* because the lines-of-progression seniority plan acted as a deterrent to transfer. This type of remedy does not destroy collective bargaining rights, but merely sets limits on that freedom. "Company seniority is a common denominator which treats all employees fairly regardless of past alleged dis-

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[209] Tilton v. Missouri Pac. R.R. Co., 376 U.S. 169 (1964) (returning veterans were allowed to have the seniority they would have earned had they not served in the military); Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) (retroactive seniority awarded to victims of discrimination).

[210] Cooper & Sobol, *supra* note 9, at 1605. "Were it not for the prior exclusion of black workers, an incumbent white employee might not even have obtained employment, much less acquired substantial promotional expectancies." *Id.* at 1605-06.

[211] 424 U.S. at 774.

[212] *Id.* at 779. *See also* United States v. City of Miami, 614 F.2d 1322, 1341 n.37 (5th Cir. 1980); Vogler v. McCarthy, Inc., 451 F.2d 1236 (5th Cir. 1971); Marinelli, *Seniority Systems and Title VII*, 14 AKRON L. REV. 253 (1980).

[213] 560 F.2d 224 (7th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

[214] *Id.* at 229-30. This decision addressed gender-based discrimination as well as race discrimination.

[215] *Id.* at 233.

[216] *Id.* at 234. *See also* EEOC v. AT & T, Co., 556 F.2d 167, 178-79 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976).

crimination."[217] If a seniority system is unlawful, then a remedy is necessary, and the fact that the system was collectively bargained-for is not a legal defense.[218] Therefore, seniority systems can be challenged by showing that the collectively bargained-for agreement is unlawful under Title VII and thus an unenforceable contract.

The *American Tobacco* decision has given greater freedom to unions and employees to establish seniority systems on discriminatory terms. The bargaining process will be undermined as the incentives to eradicate discrimination no longer exist. There is no sanction left to ensure that the goals of Title VII are heeded in the process of negotiating seniority systems because most seniority systems will fall under the 703(h) exemption.

C. Recommendation for Change

In order to clarify the meaning and scope of section 703(h) as it relates to seniority systems, certain factors must be considered. First, it must be determined conclusively whether present intent to discriminate is required in order to prove that a seniority system is unlawful. It should be sufficient to show a discriminatory effect or disparate impact, brought on by a prior intent to discriminate. A neutral system which effectively hides discriminatory motives should not pass muster. Second, a determination of whether section 703(h) insulates post-Act seniority systems must be made. To now allow an expansion of the protection of section 703(h) to post-Act systems ignores the fact that employers have had almost two decades to rid their job practices of discrimination. Third, a working definition of "bona fide" is necessary in order to determine which seniority systems are shielded by the 703(h) exemption. Merely stating that bona fide seniority systems are protected is too vague, and serves as too great a barrier for Title VII litigants.

Judging by its recent decisions, the Court may not be the body to clarify section 703(h). The legislature should reconsider the purpose of the seniority exemption to Title VII. If Congress' findings prove that there are some seniority systems which still require protection, a suitable change in the law might read:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a . . . seniority system or merit system, or a system which measures earnings by a quantity or quality of production or to employees who work in

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[217] 560 F.2d at 235. *Cf.* Tangren v. Wackenhut Servs., Inc., 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916, (1982) (collective bargaining agreement incorporated an affirmative action plan which modified existing seniority rights, and the court held that seniority is merely an economic right which unions may elect to bargain away).

[218] Heard v. Mueller Co., 464 F.2d 190, 193 (6th Cir. 1972).

different locations, provided that such differences *do not reflect an intention to discriminate because of race, color, religion, sex, or national origin which may have entered at any stage of the formation of such system. This section is limited to those systems in effect prior to the effective date of Title VII and must be construed in light of the purposes of Title VII.*[219]

After due consideration of the original need to protect seniority systems, the legislature may conclude there is no present need to protect seniority systems. Unions and employers would simply have to ensure that their seniority systems comply with the affirmative mandates of Title VII.

VI. Conclusion

The shortcomings of section 703(h) are exemplified by the Supreme Court's decision in *American Tobacco Co. v. Patterson.* The difficulties with the interpretation of section 703(h) stem from the lack of a definitive legislative history and the language of the subsection itself. Further difficulties arise because of the Court's failure to read section 703(h) in light of the affirmative mandates of Title VII. The Court cannot ignore the basic dictates of Title VII, which attempt to rid private employment of discrimination.

In order for there to be true equal employment opportunity and the abolition of discrimination in the work place, employment practices cannot merely appear neutral while perpetuating discrimination against certain groups. Employment policies must be explicitly and implicitly neutral.

In order to avoid further discriminatory practices, the legislature must either redraft or totally abolish section 703(h). If the choice is to redraft, the following elements must be considered necessary: 1) that a definition of "bona fide" be forthcoming; 2) that the seniority exemption be limited to pre-Act systems; 3) that it be acknowledged that an intent to discriminate can exist during the development of a system and that there need not be a present intent; and 4) that section 703(h) be construed in light of the broad purposes of Title VII. Until these issues are addressed, equal employment opportunity cannot be a reality.

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[219] 42 U.S.C. § 2000e-2(h) (1976) (italicized portions added by author).